

**ALABAMA DEPARTMENT OF  
ENVIRONMENTAL MANAGEMENT**

IN THE MATTER OF:	)	
	)	
Roy McCaig	)	CONSENT ORDER NO:
Lincoln, Talladega County, Alabama	)	
	)	
Open Burning	)	
<u>Lincoln, Talladega County, Alabama</u>	)	

**PREAMBLE**

This Special Order by Consent is made and entered into by the Alabama Department of Environmental Management (hereinafter, “the Department”) and Roy McCaig (hereinafter, “McCaig”) pursuant to the provisions of the Alabama Environmental Management Act, Ala. Code §§ 22-22A-1 to 22-22A-16 (2006 Rplc. Vol.), the Alabama Air Pollution Control Act, Ala. Code §§ 22-28-1 to 22-28-23 (2006 Rplc. Vol.), and the regulations promulgated pursuant thereto.

**STIPULATIONS**

1. McCaig was the source for three reported, and verified, instances of illegal open burning on his properties in Lincoln, including Plantation Park, a mobile home park. All properties are located within Talladega County.
2. The Department is a duly constituted department of the State of Alabama pursuant to Ala. Code §§ 22-22A-1 to 22-22A-16 (2006 Rplc. Vol.).
3. Pursuant to Ala. Code § 22-22A-4(n) (2006 Rplc. Vol.), the Department is the state air pollution control agency for the purposes of the federal Clean Air Act, 42 U.S.C. 7401 to 7671q, as amended. In addition, the Department is authorized to administer and enforce the provisions of the Alabama Air Pollution Control Act, Ala. Code §§ 22-28-1 to 22-28-23 (2006 Rplc. Vol.).
4. ADEM Admin Code r. 335-3-3-.01(2)(b)4 states that only vegetation and untreated wood may be burned, and that it is unauthorized to open burn heavy oils,

asphalt products, plastics, vinyl materials, insulation, paper, cardboard, natural or synthetic rubber, salvage or scrap materials, chemicals, garbage, treated or painted wood, or any trash.

5. ADEM Admin Code r. 335-3-3-.01(2)(d) states that permission to open burn under the provisions of ADEM Admin Code r. 335-3-3-.01(2) is revoked during the months of May, June, July, August, September, and October in Baldwin, DeKalb, Etowah, Jefferson, Lawrence, Madison, Mobile, Montgomery, Morgan, Shelby, Russell, and Talladega Counties.

6. On September 12, 2000, illegal open burning was documented by Department personnel conducting a complaint investigation of open burning on McCaig's property. The inspector observed a large pile of brush and refuse that had been burned on McCaig's property southwest of the Honda Plant in Lincoln, a violation of ADEM Admin Code r. 335-3-3-.01(2)(b)4.

7. On October 1, 2002, illegal open burning was again documented by Department personnel conducting a complaint investigation of open burning on McCaig's property. Furniture, mattresses, tires, and other refuse were observed in a smoldering pile at the same site as the previous documented open burning on McCaig's property, a violation of ADEM Admin Code r. 335-3-3-.01(2)(b)4.

9. On June 16, 2010, the Air Division received a complaint of open burning on McCaig's property, specifically Plantation (Mobile Home) Park, located at 3080 McLain Avenue in Lincoln. The subsequent investigation revealed yet another instance of illegal open burning of tires, stumps, and other refuse, violations of ADEM Admin Code r. 335-3-3-.01(2)(b)4 and ADEM Admin Code r. 335-3-3-.01(2)(d).

10. McCaig consents to abide by the terms of the following Order and to pay the civil penalty assessed herein.

9. The Department has agreed to the terms of this Consent Order in an effort to resolve the violations cited herein without the unwarranted expenditure of State resources in further prosecuting the above violations. The Department has

determined that the terms contemplated in this Consent Order are in the best interests of the citizens of Alabama.

#### CONTENTIONS

Pursuant to Ala. Code § 22-22A-5(18)c. (2006 Rplc. Vol.), in determining the amount of any penalty, the Department must give consideration to the seriousness of the violation, including any irreparable harm to the environment and any threat to the health or safety of the public; the standard of care manifested by such person; the economic benefit which delayed compliance may confer upon such person; the nature, extent and degree of success of such person's efforts to minimize or mitigate the effects of such violation upon the environment; such person's history of previous violations; and the ability of such person to pay such penalty. Any civil penalty assessed pursuant to this authority shall not be less than \$100.00 or exceed \$250,000.00. Each day such violation continues shall constitute a separate violation. In arriving at this civil penalty, the Department has considered the following:

A.       SERIOUSNESS OF THE VIOLATION: The actions of McCaig, by open burning unauthorized materials, and by burning vegetation during the open burning ban, may have contributed to the elevated levels of ozone and fine particulate matter in Talladega County.

B.       THE STANDARD OF CARE: There appeared to be insufficient care taken by McCaig to comply with the applicable requirements of the ADEM Administrative Code.

C.       ECONOMIC BENEFIT WHICH DELAYED COMPLIANCE MAY HAVE CONFERRED: McCaig likely derived economic benefit by not always engaging in the proper disposal of refuse.

D.       EFFORTS TO MINIMIZE OR MITIGATE THE EFFECTS OF THE VIOLATION UPON THE ENVIRONMENT: There were no efforts by McCaig to mitigate possible effects of these violations upon the environment.

E. HISTORY OF PREVIOUS VIOLATIONS: McCaig has three known violations of open burning regulations with the Department.

F. THE ABILITY TO PAY: McCaig has not alleged an inability to pay the civil penalty.

G. OTHER FACTORS: It should be noted that this Special Order by Consent is a negotiated settlement and, therefore, the Department has compromised the amount of the penalty it believes is warranted in this matter in the spirit of cooperation and the desire to resolve this matter amicably, without incurring the unwarranted expense of litigation.

#### **ORDER**

THEREFORE, McCaig, along with the Department, desires to resolve and settle the compliance issues cited above. The Department has carefully considered the facts available to it and has considered the six penalty factors enumerated in Ala. Code § 22-22A-5(18)c. (2006 Rplc. Vol.), as well as the need for timely and effective enforcement, and the Department believes that the following conditions are appropriate to address the violations alleged herein. Therefore, the Department and McCaig agree to enter into this ORDER with the following terms and conditions:

A. McCaig agrees to pay to the Department a civil penalty in the amount of \$3,500.00 in settlement of the violations alleged herein within forty-five days from the effective date of this Consent Order. Failure to pay the civil penalty within forty-five days from the effective date may result in the Department's filing a civil action in the Circuit Court of Montgomery County to recover the civil penalty.

B. McCaig agrees that all penalties due pursuant to this Consent Order shall be made payable to the Alabama Department of Environmental Management by certified or cashier's check and shall be remitted to:

Office of General Counsel  
Alabama Department of Environmental Management  
P.O. Box 301463  
Montgomery, AL 36130-1463

C. That immediately upon receipt of this Order and continuing thereafter, McCaig shall ensure immediate and future compliance with ADEM Admin. Code r. 335-3-3-.01.

D. The parties agree that this Consent Order shall apply to and be binding upon both parties, their directors, officers, and all persons or entities acting under or for them. Each signatory to this Consent Order certifies that he or she is fully authorized by the party he or she represents to enter into the terms and conditions of this Consent Order, to execute the Consent Order on behalf of the party represented, and to legally bind such party.

E. The parties agree that this Consent Order, subject to the terms of these presents and subject to provisions otherwise provided by statute, is intended to operate as a full resolution of the violations which are cited in this Consent Order.

F. McCaig agrees that he is not relieved from any liability if he fails to comply with any provision of this Consent Order.

G. For purposes of this Consent Order only, McCaig agrees that the Department may properly bring an action to compel compliance with the terms and conditions contained herein in the Circuit Court of Montgomery County. McCaig also agrees that in any action brought by the Department to compel compliance with the terms of this Agreement, McCaig shall be limited to the defenses of *Force Majeure*, compliance with this Agreement and physical impossibility. A *Force Majeure* is defined as any event arising from causes that are not foreseeable and are beyond the reasonable control of McCaig, including his contractors and consultants, which could not be overcome by due diligence (i.e., causes which could have been overcome or avoided by the exercise of due diligence will not be considered to have been beyond the reasonable control of McCaig) and which delays or prevents performance by a date required by the Consent Order. Events such as unanticipated or increased costs of performance, changed economic circumstances, normal precipitation events, or failure to obtain federal, state, or local permits shall not constitute *Force Majeure*. Any request

for a modification of deadline must be accompanied by the reasons (including documentation) for each extension and the proposed extension time. This information shall be submitted to the Department a minimum of ten working days prior to the original anticipated completion date. If the Department, after review of the extension request, finds the work was delayed because of conditions beyond the control and without the fault of McCaig, the Department may extend the time as justified by the circumstances. The Department may also grant any other additional time extension as justified by the circumstances, but it is not obligated to do so.

H. The Department and McCaig agree that the sole purpose of this Consent Order is to resolve and dispose of allegations and contentions stated herein concerning the factual circumstances referenced herein. Should additional facts and circumstances be discovered in the future concerning McCaig which would constitute possible violations not addressed in this Consent Order, then such future violations may be addressed in Orders as may be issued by the Director, litigation initiated by the Department, or such other enforcement action as may be appropriate, and McCaig shall not object to such future orders, litigation or enforcement action based on the issuance of this Consent Order if future orders, litigation, or other enforcement action address new matters not raised in this Consent Order.

I. The Department and McCaig agree that this Consent Order shall be considered final and effective immediately upon signature of all parties. This Consent Order shall not be appealable, and McCaig does hereby waive any hearing on the terms and conditions of same.

J. The Department and McCaig agree that this Order shall not affect McCaig's obligation to comply with any Federal, State, or local laws or regulations.

K. The Department and McCaig agree that the final approval and entry into this Order are subject to the requirements that the Department give notice of proposed Orders to the public, and that the public have at least thirty days within which to comment on the Order.

L. The Department and McCaig agree that, should any provision of this Order be declared by a court of competent jurisdiction or the Environmental Management Commission to be inconsistent with Federal or State law and therefore unenforceable, the remaining provisions hereof shall remain in full force and effect.

M. The Department and McCaig agree that any modifications of this Order must be agreed in writing signed by both parties.

N. The Department and McCaig agree that, except as otherwise set forth herein, this Order is not and shall not be interpreted to be a permit or modification of an existing permit under Federal, State or local law, and shall not be construed to waive or relieve McCaig of his obligations to comply in the future with any permit.

Executed in duplicate, with each part being an original.

**ROY MCCAIG**

**ALABAMA DEPARTMENT OF  
ENVIRONMENTAL MANAGEMENT**

\_\_\_\_\_  
(Signature)

\_\_\_\_\_  
Lance R. LeFleur  
Director

\_\_\_\_\_  
(Printed Name)

\_\_\_\_\_  
Date Executed

\_\_\_\_\_  
(Printed Title)

\_\_\_\_\_  
Date Signed